STATE OF MICHIGAN

COURT OF APPEALS

CHARTER OAK HOMES, Petitioner-Appellant,	UNPUBLISHED October 6, 2011
v	No. 297509 Tax Tribunal
CITY OF DETROIT, Respondent-Appellee.	LC No. 00-354554

Before: MURPHY, C.J., and FITZGERALD and TALBOT, JJ.

MURPHY, C.J. (*dissenting*).

Because petitioner, Charter Oak Homes (hereafter "Charter Oak"), failed to present any proofs or evidence at the default hearing as acknowledged by its own attorney at the hearing, and because Charter Oak does not even claim on appeal that it presented evidence or proofs of any kind at the hearing but instead argues that it was not required to do so, I respectfully dissent. I would affirm the opinion and judgment entered by the Michigan Tax Tribunal (MTT) that effectively favored respondent, city of Detroit (hereafter "the city").

Charter Oak is a property developer, and it purchased real estate encompassing a couple of blocks in Detroit, including a section of Brush Street. Charter Oak essentially razed dilapidated structures located on the two blocks and then built new townhouses. The area comprised a neighborhood enterprise zone. According to counsel, Charter Oak redid the sewer system, utilities, and roadways that served the developed property. By 2008, Charter Oak had sold all of the townhouses, except for one located at 2555 Brush Street, which is the parcel at issue in this ad valorem property tax case. In its petition filed in the MTT, Charter Oak alleged that, with respect to the 2008 assessment year, the city arrived at an assessed value of $81,268 and a taxable value of $81,268 for the property and that on the basis of a 1.00 equalization factor, the assessment projected a true cash value of $162,536. Charter Oak further alleged in the petition that the true cash value was no higher than $100,000, that the assessed and taxable values should have been set at no higher than $50,000 based on a 1.00 equalization factor, and that, given the current assessed value of $81,268, the amount in contention as to assessed value was $31,268. According to Charter Oak, the city's assessment exceeded 50% of the subject property's true cash value, thereby violating MCL 211.27 and MCL 211.27a. Charter Oak's petition suggests that an appeal challenging the assessment was made to the local board of review.

The city failed to file an answer to Charter Oak's MTT petition as required by Tax Tribunal Rule (TTR) 245(1).[1] Accordingly, the MTT entered an order placing the city in default pursuant to TTR 247(1).[2] The order required the city to file an answer to the petition and a motion to set aside the default within 21 days, warning the city that failure to comply with the order would result in the scheduling of a default hearing under TTR 247. After the city again failed to respond, Charter Oak filed a motion for a default hearing, and an order was entered granting the motion. Subsequently, a default hearing was conducted in accordance with TTR 247(2).[3] No one from the city appeared at the hearing, despite knowledge of the hearing. When the MTT inquired about Charter Oak's proofs to show the property's true cash value, counsel responded:

> I don't have anything because I can't get anything from them and I can't get the numbers. I have nobody to talk to. I have tried at least ten times, and this is a number based on the other cases that we have settled with them in that same subdivision.

Subsequently, the MTT issued a written opinion and judgment, which provided, in part, as follows:

> In this instance, [Charter Oak] was not able to prove that the state equalized and taxable value . . . was incorrectly calculated by [the city]. [Charter

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[1] TTR 245(1) provides that a "respondent shall have 28 days from the date of service of the petition within which to file an answer or other responsive pleading[,] [and] [f]ailure to file an answer within 28 days may result in the scheduling of a default hearing[.]"

[2] TTR 247(1) provides:

> If a party has failed to plead, appear, or otherwise proceed as provided by these rules or as required by the tribunal, then the party may be held in default by the tribunal on motion of another party or on the initiative of the tribunal. A party placed in default shall cure the default as provided by the order placing the party in default and file a motion to set aside the default accompanied by the appropriate fee within 21 days of the entry of the order placing the party in default or as otherwise ordered by the tribunal. Failure to comply with an order of default may result in the dismissal of the case or the scheduling of a default hearing as provided in this rule.

[3] TTR 247(2) provides:

> For purposes of this rule, "default hearing" means a hearing at which the defaulted party is precluded from presenting any testimony or submitting any evidence not submitted to the tribunal before the entry of the order placing the party in default and may not, unless otherwise ordered by the tribunal, examine the other party's witnesses.

> Oak] did not submit any evidence as to what the correct parcel identification number, street address, state equalized value and taxable values are for [the] subject property that [Charter Oak] believes has an estimated true cash value of $100,000 for some property located in the vicinity of 2555 Brush Street, Detroit, Michigan. [Charter Oak] provided no valuation evidence, no witnesses, nor any property record card on file with the City of Detroit.
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> It simply is insufficient for [Charter Oak] to announce to the [MTT] that the subject property is over assessed; however, without any documentation as to what the actual state equalized value and taxable values are[;] [Charter Oak] simply does not meet the burden of proof.

The opinion and judgment then provided that "the property's assessed and taxable values for the tax year[] at issue shall be as set forth in the Findings of Fact section of this Final Opinion and Judgment." However, the opinion and judgment does not have a findings-of-fact section. Given that Charter Oak presented no evidence and that the city was not permitted to submit evidence even had it appeared, it is logical that the opinion and judgment lacked a findings-of-fact section because there was no evidence upon which to make factual findings. Despite the confusing language of the opinion and judgment, there does not appear to be any dispute that the MTT effectively left the city's assessment of the property intact and controlling.[4] However, the MTT did not make a specific finding that the true cash value of the property was indeed consistent with the city's assessment.

Charter Oak moved for reconsideration and rehearing, arguing that the evidence concerning increases in taxable value was completely under the city's dominion and control, that a petitioner would be hard-pressed to ever succeed in a taxable-value appeal where a respondent simply refuses to participate, that "[i]nformation such as addition computations for taxable value purposes are performed by the assessor and are under the control of the [city]," and that "logic dictates that the burden of persuasion shifts when it comes to proving the value of additions . . . [because] only the [city] has evidence to prove or disprove the allegation." Under such circumstances, according to Charter Oak, the better reasoned approach would be to simply adopt a petitioner's allegations of value.

The MTT denied Charter Oak's motion for reconsideration and rehearing, stating as follows:

> [Charter Oak] ha[d] . . . the burden of proof concerning the issue of true cash value and the issue of taxable value under MCL 205.737. Further, information regarding the addition of public service improvements and the amount, if any, of those improvements was, in fact, available to [Charter Oak] through discovery or the filing of a Freedom of Information Act request . . . .

[4] The opinion and judgment also ordered the correction of assessment rolls to reflect the property's true cash value. This was clearly boilerplate language and not applicable as there was no change in the city's assessment, nor a finding of the property's true cash value.

> [Charter Oak] had a sufficient opportunity to prepare this case for hearing and to obtain the required information given the filing of the petition . . . on July 25, 2008, and the conducting of the default hearing on July 16, 2009.

On appeal, Charter Oak contends that the MTT committed an error of law and adopted a wrong principle when it required Charter Oak to meet a burden of proof, even though the city failed to contest the appeal. Charter Oak argues that when the city failed to deny or contest the allegations in the petition, the allegations were deemed admitted. Finally, Charter Oak maintains that the MTT erred in requiring the same burden of proof as in a contested case. The majority does not address any of these arguments, holding sua sponte that "Charter Oak did submit proof in the form of counsel's indication of the method used for deriving its proposed assessed and taxable values, citing similar models within the same development that had already been negotiated or adjudicated regarding their assessed valuations."

In the absence of fraud, our review of a decision issued by the MTT is limited to determining whether it erred in applying the law or adopted a wrong principle, and the MTT's factual findings are conclusive if, on the whole record, they are supported by competent, material, and substantial evidence. *Klooster v City of Charlevoix*, 488 Mich 289, 295; 795 NW2d 578 (2011); *Mich Bell Telephone Co v Dep't of Treasury*, 445 Mich 470, 476; 518 NW2d 808 (1994). An issue of statutory construction is a question of law that is reviewed de novo. *Klooster*, 488 Mich at 295-296. "The primary goal of statutory interpretation is to give effect to the Legislature's intent, focusing first on the statute's plain language." *Id.* at 296. The words used by the Legislature in crafting a statute provide us with the most reliable evidence of the Legislature's intent. *Id.* "When construing a statute, a court must read it as a whole." *Id.*

I would like to address the arguments actually posed by Charter Oak on appeal. Charter Oak's first argument is that the city's failure to deny or contest the allegations in the petition constituted an admission to the allegations. Charter Oak cites and relies on TTR 111(4), which provides that the Michigan Rules of Court apply "[i]f an applicable entire tribunal rule does not exist." Charter Oak continues the argument by claiming that TTR 111 triggers the applicability of MCR 2.111(E)(1), which provides that "[a]llegations in a pleading that requires a responsive pleading, other than allegations of the amount of damage or the nature of the relief demanded, are admitted if not denied in the responsive pleading." I would find that this argument lacks merit because TTRs do exist with respect to a failure to file an answer. As reflected above, TTR 245(1) requires a respondent to file an answer or other responsive pleading within 28 days of being served with a petition, and failure to do so can result in the scheduling of a default hearing. Also, under TTR 247(1), if a party fails to plead, appear, or otherwise proceed, the MTT may hold that party in default. If placed in default, the defaulting party is then required to file a motion to set aside the default within 21 days, and if the party fails to do so, the MTT may dismiss the case, which remedy would not be applicable here because the respondent city defaulted, or the MTT can schedule a default hearing. TTR 247(1). Further, at the default hearing, "the defaulted party is precluded from presenting any testimony or submitting any evidence not submitted to the tribunal before the entry of the order placing the party in default and may not, unless otherwise ordered by the tribunal, examine the other party's witnesses." TTR 247(2). Accordingly, the TTRs fully address a failure to answer a petition and provide the ramifications of a failure to plead and the procedural mechanism employed upon a default. Thus, it would not be proper to consider MCR 2.111(E) as argued by Charter Oak.

Charter Oak also contends that the MTT erred in requiring the same burden of proof as in a contested case. Charter Oak argues:

> For the Tribunal to require a taxpayer to go to the expense of providing witnesses, exhibits and perhaps an expert in order to meet its burden of proof in a non-contested case not only tilts the scales of justice in favor of a municipality; it wastes resources of the taxpayer, as well as the Tribunal. If it is not worth the City of Detroit's time to defend a challenge to its assessment, the Tribunal should not require a taxpayer to put forth a full blown case to prevail.

Charter Oak complains that it makes no sense for the MTT to treat an uncontested case like it does a contested case, especially considering the MTT's limited resources and the fact that it has an overwhelming number of pending cases. Charter Oak further argues that a taxpayer is placed in a worse position when a city fails to contest a petition than the taxpayer would be in relative to a contested case, in part because discovery is not available. And any other avenues to obtain information, such as a FOIA request, would be expensive and time-consuming. Charter Oak asserts that the MTT's ruling, set forth "under the guise of 'burden of proof,'" calls the MTT's impartiality into question, as the "additional weight placed on the other side of the scales of justice must be overcome by the taxpayer."

Charter Oak's position is impassioned, but it relies solely on arguments framed in terms of practicality, logic, and expressions of public policy stances, absent any discussion, analysis, or even acknowledgement of the TTRs, 1963 Const, art 9, § 3,[5] which governs ad valorem property taxation, relevant statutes, such as MCL 205.737 and MCL 211.27a,[6] and pertinent caselaw addressing these provisions. The MTT's ruling was ultimately based on MCL 205.737(3), which provides, in part, that "[t]he petitioner has the burden of proof in establishing the true cash value of the property." Charter Oak does not even cite this statutory provision, let alone attempt to explain, on the basis of legal authorities, why it should not control in the case at bar. As our Supreme Court stated in *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998):

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[5] Const 1963, art 9, § 3, provides in part:

> The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law except for taxes levied for school operating purposes. The legislature shall provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformly assessed, which shall not, after January 1, 1966, exceed 50 percent; and for a system of equalization of assessments.

[6] MCL 205.737(1) provides that the MTT "shall determine a property's taxable value pursuant to section 27a of the general property tax act, 1893 PA 206, MCL 211.27a." MCL 211.27a(1) provides that, "[e]xcept as otherwise provided in this section, property shall be assessed at 50% of its true cash value under section 3 of article IX of the state constitution of 1963."

> "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow." [Citation omitted.]

Again, there is a complete dearth of *legal* analysis in Charter Oak's appellate brief with respect to its argument that the MTT erred in requiring the same burden of proof as in a contested case. I further note that Charter Oak does not acknowledge *Aldridge v Greenbush Twp*, __ MTTR __, 2007 WL 2481070 (Docket No. 310158, April 11, 2007), wherein the MTT held that, under MCL 205.737, a petitioner has the burden of proof to establish the subject property's true cash value and that a "[p]etitioner's burden is not eliminated, or reduced, because the hearing in th[e] case was a default hearing." This Court affirmed in an unpublished opinion.

I recognize that proceedings in the MTT are original, independent, and are considered de novo, that an assessment carries no presumption of validity, that the MTT cannot simply affirm an assessment absent supporting evidence, that the MTT has a duty to make its own independent determination of true cash value, and that on the failure of a petitioner's evidence to show that an assessment should be lower, the burden of going forward with evidence may shift to the respondent. MCL 205.735a(2); *President Inn Props, LLC v Grand Rapids*, __ Mich App __; __ NW2d __, issued February 17, 2011 (Docket No. 294452), slip op at 6. Here, we do not have a situation where the evidence submitted by Charter Oak was inadequate to support its position; rather, no evidence whatsoever was even presented by Charter Oak. Under the circumstances of this case, it was impossible for the MTT to make its own independent determination of true cash value and, on my review of the two opinions issued by the MTT, the MTT never made a finding regarding the property's true cash value or the soundness of the city's assessment; it merely found that Charter Oak failed to go forward with any evidence challenging the assessment. Although the effect of the MTT's ruling was to leave intact the city's assessment, the MTT had no other option under the TTRs and statutes.[7] In essence, the MTT's ruling was not a finding in favor of the city's assessment, but was instead simply a dismissal of Charter Oak's petition.

I respectfully disagree with the majority that the MTT committed legal error by rubber stamping the city's valuation and by failing to engage in an independent determination of the value of the subject property. Again, the MTT did not find that the city's assessment accurately

[7] I also point out that Charter Oak's argument that there was no feasible mechanism to obtain information from the city lacks merit. Under MCL 205.736(1), the MTT, "upon written request of a party to a proceeding, shall issue subpoenas forthwith requiring the attendance and testimony of witnesses and the production of evidence including but not limited to books, records, correspondence, and documents in their possession or under their control." The record reflects that Charter Oak never availed itself of the opportunity and ability to have the MTT issue subpoenas to the city or city personnel in an effort to gather pertinent information and documentation.

reflected the property's true cash value, and I fail to understand how the MTT could have engaged in an independent determination of the property's value when it had no *evidence* whatsoever to consider on the matter. With respect to the majority's reliance on the purported "submission of evidence" by way of statements made by Charter Oak's counsel, it is well-established that statements and arguments by counsel do not constitute evidence. *Guerrero v Smith*, 280 Mich App 647, 658; 761 NW2d 723 (2008); *Tobin v Providence Hosp*, 244 Mich App 626, 641; 624 NW2d 548 (2001). Charter Oak did not and does not even claim that it presented evidence or made submissions. I would also note that at oral argument before this Court, counsel for the city maintained that an attorney arguing before the MTT could not submit evidence vis-à-vis the attorney's own statements or "testimony." The city's counsel stated in response to questions at oral argument before this Court that if an attorney made so-called submissions, they could be considered by the MTT, but only if opposing counsel had the opportunity to object and failed to object. Without agreeing with the city attorney's view, I note that no opposing counsel was present here. Moreover, at the default hearing, counsel for Charter Oak was simply explaining to the MTT how he arrived at the claimed value. The explanation was clearly not intended to be a submission of evidence that would necessitate an objection, especially considering counsel's subsequent statement to the MTT that "I don't have anything."

I would affirm the opinion and judgment entered by the MTT. Accordingly, I respectfully dissent.

/s/ William B. Murphy